Supreme Court of the United States

OCTOBER TERM, 1970

No. 299

PAUL ROBERT COHEN, *Appellant,*

—v.—

CALIFORNIA

APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

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IN THE MUNICIPAL COURT OF
LOS ANGELES JUDICIAL DISTRICT
COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

476373

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF

vs.

PAUL ROBERT COHEN, DEFENDANT

COMPLAINT—Filed April 29, 1968

Personally appeared before me, the undersigned, who, first being duly sworn, complains and says: That on or about Apr. 26, 1968, at and in Los Angeles City, in the County of Los Angeles, State of California, a misdemeanor, to-wit: VIOLATION of Section 415 of the Penal Code of the State of California was committed by PAUL ROBERT COHEN (whose true name to affiant is unknown), who at the time and place last aforesaid, did wilfully and unlawfully and maliciously disturb the peace and quiet of the neighborhood of 110 North Grand and the peace and quiet of this complainant and other persons then and there being present, by then and there, engaging in tumultuous and offensive conduct. All of which is contrary to the law in such cases made and provided, and against the peace and dignity of the People of the State of California. Said Complainant therefore prays that a warrant may be issued for the arrest of said Defendant that he may be dealt with according to law.

Subscribed and sworn to before me on Apr. 29, 1968.

/s/ H. A. Spearman
H. A. SPEARMAN
GEORGE J. BARBOUR
Clerk of the Municipal
Court of Los Angeles
Judicial District, in said
County and State

By _____
Deputy Clerk

May 13, 1968

I hereby certify this to be a true and correct copy of the original Complaint on file in this office, GEORGE J. BARBOUR, Clerk of Municipal Court of Los Angeles Judicial District, County of Los Angeles, State of California.

By /s/ K. Beth Spratt
Deputy

[SEAL]

(Form P.C. 415)

IN THE MUNICIPAL COURT
OF LOS ANGELES JUDICIAL DISTRICT

IN THE COUNTY OF LOS ANGELES
STATE OF CALIFORNIA

[Filed Nov. 8, 1968, William G. Sharp, County Clerk, by V. Willis, Deputy.]

No. 310996

Cr. A 8258

THE PEOPLE OF THE STATE OF CALIFORNIA

vs.

PAUL R. COHEN

Date Posted	Appearance Date	Amount	Receipt or Bond No.	Surety
APR 29 1968	MAY 1 1968	625—	9931	NAT

Date	
Apr. 29, 1968	Complaint filed declared to by H. A. Spearman charging the Defendant with having on Apr. 26, 1968 at Los Angeles City, in the County of Los Angeles, State of California, committed a misdemeanor, to-wit: Viol. of Sec. 415 P. C.
May 1, 1968	BRENT PERRY SHAW. Report is ordered to take down as provided by law. Illegible.
	Case called, Judge Mary E. Waters, Judge presiding.

Date	
May 1, 1968	Both parties ready. People represented by Jan A. Connor, (D.C.A.) Defendant represented by K. Wissot, Deputy Public Defendant for arraignment only. Defendant in court, duly arraigned, informed of the charge/s against him and of his legal rights. Defendant gives true name as charged and enters his plea of not guilty of the offense charged. Defendant with counsel in open court each personally demands jury trial. Defendant instructed to appear personally for trial. Trial set for May 15, 1968, 9 A.M. in Div. 20. Bail $625 incl. P.A., Bail to Stand.
May 10, 1968	In the following case Arthur Radon Reporter is ordered to take down procedings as provided by law. Cause Called. Judge [Illegible] Presiding. Both parties ready. People represented by David Perez (D.C.A.) Defendant not in court but represented by Sperbey by Nimmer. Motion by defendant for advance continuance Granted. Cont. to 6/10 1968, 8:30 A.M. Div. 20. Deft. waives statutory time. Bail up to stand. (for trial)
Illegible	Notice if Motion & Motion to Supress Evidence on constitutional grounds filed.
Illegible	In this case Patricia A. Minter Reporter is ordered to take down proceedings as provided by law. Div. 20 convened at M., Cause called. Judge Robert Fainer presiding. Both parties ready. People represented by David Perez. (D.C.A.) Defendant not in court but represented by M. Nimmer; E. B. Nisbet Deputy Clerk; Cause advanced for purpose of motion

Date	
Illegible	Court put on notice that motion to dismiss will be made on 6-10-68 at 8:30 Div. 20.
	BAIL UP TO STAND
Illegible	In this case Mildred Herr Reporter is ordered to take down proceedings as provided by law. Div. 20 convened at M., Cause called. Judge Robert Fainer presiding. Both parties ready. People represented by David Perez (D.C.A.) Defendant in court and represented by M. Nimmer; E. B. Nisbet Deputy Clerk; People's motion for continuance. Cause continued to 8-16-68, 1:30 A.M. Div. 20 for hearing on motion. Defendant waives time.
	BAIL UP TO STAND
Illegible	Defendants memo of Points and Authorities in support of his motion to suppress evidence on constitutional grounds filed this date. Error.
Illegible	Points and authorities in opposition to defendants motion filed with Affidavit of Service by mail.
Illegible	Defendants reply memo in support of his motion to suppress evidence on constitutional grounds, with affidavit of service by mail filed this date.
Aug. 16, 1968	In this case Elias J. Papachrisios Reporter is ordered to take down proceedings as provided by law. Div. 20 convened at M., Cause called. Judge David J. Aisenson presiding. Both parties ready. People represented by Robert W. Thomas (D.C.A.) Defendant in court and represented by Melvill B. Nimmer; E. B. Nisbet Deputy Clerk; Defendant's motions to continue.

Date	
Aug. 16, 1968	Cause continued to 9-4 1968 1:30 P.M. for hearing on defendant's motion to suppress. DEFENDANT WAIVES TIME BAIL UP TO STAND
Illegible	In this case Erwin Goodman Reporter is ordered to take down proceedings as provided by law. Div. 20 convened at . M., Cause called. Judge David J. Aisenson presiding. Both parties ready. People represented by Robert W. Thomas (D.C.A.) Defendant in court and represented by Melville B. Nimmer; E. B. Nisbet Deputy Clerk; Motion to suppress off calendar. Case continued for trial to 9-27-68 8:30 A.M. Time waived. Bail to stand.
Sep. 27, 1968	In this case [illegible] Reporter is ordered to take down proceedings as provided by law. Div. 20 convened at M., Cause called. Judge Robert Fainer presiding. Both parties ready. People represented by Robert W. Thomas (D.C.A.) Defendant in court and represented by Melville B. Nimmer; Henry P. Baum Deputy Clerk; transferred to Div. 21 for trial.
Sep. 27, 1968	In this case Arlene Jenkins Reporter is ordered to take down proceedings as provided by law. Div. 21 convened at 10:35 A.M. Cause called. Judge James Harvey Brown presiding. Both praties ready. Defendant in court and represented by Melville B. Nimmer PD Shirley Estes Deputy Clerk. People and Defendant and his counsel in open court each personally waives jury trial. Witness for State: Houston Splawn

Date	
Sep. 27, 1968	At 10:40 A.M. Cause recessed to 10:50 A.M. At 10:50 A.M. Cause called. Stipulated that jury and all other parties are present as before
	Witnesses for State: Continued
	People's Exhibits:
	Houston Splawn—resumes testimony
	1. Blue levi jacket with writings Defendants objection to introduction of Peoples Exhibit I overruled At 11:15 A.M. Cause recessed to 11:20 A.M. At 11:20 A.M. Cause called. Stipulated that all parties are present as before.
	Witnesses for State: Continued Cathryn Scholler John A. Alexander
	People rest
	Defendants motion pursuant to section 1118 Penal Code
	Defendants Memorandum of Points and Authorities in support of Defendants motion for entry of Judgment of Acquittal filed.
	At 2:10 P.M. Cause called. Stipulated that all parties are present as before
	Defendants motion argued
	Defendants motion pursuant to section 1118
	Penal Code is denied
	Witnesses for Defendant: Paul Robert Cohen
	Defendant rests

Date	
Sep. 27, 1968	Both sides rest
	Cause argued
	Defendant adjudged ✔ guilty as charged
	Defendant waives time for sentence
	Cause continued for sentence to Oct. 3, 1968 at 1:30 P.M. Div. 21
	Bail up to stand
Illegible	In this case Arlene Jenkins Reporter is ordered to take down proceedings as provided by law. Div. 21 convened at 1:30 P.M., Cause called. Judge James Harvey Brown presiding. Both parties ready. People represented by Sueanne Lewis (D.C.A.) Defendant ✔ in court and represented by Melville Nimmer; Shirley Estes Deputy Clerk; Defendant appearing in court for sentence
	Defendant in court and having been duly arraigned for judgment, and there being no legal cause why judgment should not be pronounced, "It is adjudged and ordered by the Court that, as a punishment for the crime of violation of section 415 PC the defendant shall be imprisoned in the County Jail of the County of Los Angeles for the term of 30 days, and that said defendant shall be discharged from imprisonment upon the expiration of said term."
	Defendants notice of appeal filed this date
	BAIL ORDERED EXONERATED as to original bond
	Bail on appeal set in the sum of $500.00 plus $125.00 P.A.

Date	
Illegible	$625.00 appeal bond posted — Includes $125.00 P.A. United Bonding Insurance Co. Bond #3 G 84601 ck
Illegible	Respondent notified by mail of the filing of notice of appeal.
Illegible	Proposed statement on appeal filed, with affidavit of service by mail.
Illegible	Respondent's Amendments to Appellant's Proposed Statement on Appeal filed, with affidavit of service by mail. (LATE)
Illegible	Hearing to settle Statement on Appeal set for October 30, 1968 at 9:30 A.M. in Division 21.
	Notices mailed, with affidavits of service by mail.
Illegible	In this case No Reporter is ordered to take down procedings as provided by law. Div. 21 convened at 9:30 A.M., Cause called. Judge James Harvey Brown presiding. Both parties ready. People represented by David Ellis (D.C.A.) Defendant in court and represented by Melville B. Nimmer; C. Hegler Deputy Clerk; Hearing to settle statement on appeal. The court does now settle and allow the foregoing statement on appeal and certifies that the same is a true and correct statement of the proceedings had in the above action.

IN THE APPELLATE DEPARTMENT
OF THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Superior Court No. CR A 8258
Trial Court No. 310996

PEOPLE OF THE STATE OF CALIFORNIA,
PLAINTIFF AND RESPONDENT

vs.

PAUL ROBERT COHEN, DEFENDANT AND APPELLANT

ON APPEAL FROM THE MUNICIPAL COURT OF THE
LOS ANGELES JUDICIAL DISTRICT, COUNTY OF
LOS ANGELES, STATE OF CALIFORNIA
JAMES HARVEY BROWN, Judge

This cause having been argued and submitted and fully considered, judgment is ordered as follows:

It is ORDERED and ADJUDGED that the judgment made and entered in the Municipal Court of the Los Angeles Judicial District County of Los Angeles, State of California, in the above entitled cause be and the same is hereby reversed.

MEMO—January 20, 1969

In the corridors of the courthouse the appellant wore a jacket bearing the words "Fuck the Draft." He was convicted under a criminal complaint charging him with "engaging in tumultuous and offensive conduct" in violation of Penal Code Section 415. There was no evidence that the conduct of the appellant was tumultuous, and conduct that is merely offensive is insufficient (see *Terminiello* vs. *Chicago* [1948] 337 U.S. 1; *People* vs. *Huss* [1966] 241 Cal. App. 2d 361, 366). Appellant may have been guilty of other offenses, but he was not guilty of the offense of which he was convicted.

Judgment vacated per order of February 13, 1969

We concur:

WONG
Judge

WHYTE
Presiding Judge

VASEY
Judge

APPELLATE DEPARTMENT
OF THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Superior Court No. CR. A. 8258
Trial Court No. 310996

PEOPLE OF THE STATE OF CALIFORNIA,
PLAINTIFF AND RESPONDENT

vs.

PAUL ROBERT COHEN, DEFENDANT AND APPELLANT

ORDER GRANTING REHEARING—Dated: February 13, 1969

The petition of respondent for a rehearing after judgment of this court on appeal, in the above entitled matter, having been filed and having been duly considered,

IT IS ORDERED that said petition be granted, and the judgment of this court heretofore rendered in said case is vacated. Said case is placed on the calendar for further argument at 9:30 a.m. on March 6, 1969.

While the matter is open for full reargument on all matters including Constitutional questions, attention is directed to the questions of statutory construction as applied to Penal Code § 415 involved in this appeal.

BY THE COURT

WHYTE
Presiding Judge

VASEY
Judge

WONG
Judge

APPELLATE DEPARTMENT
OF THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Superior Court No. CR. A. 8258
Trial Court No. 310996

PEOPLE OF THE STATE OF CALIFORNIA,
PLAINTIFF AND RESPONDENT

vs.

PAUL ROBERT COHEN, DEFENDANT AND APPELLANT

MEMORANDUM OPINION AND JUDGMENT—May, 23, 1969

Appeal by defendant from judgment of the Municipal Court of the Los Angeles Judicial District, James Harvey Brown, Judge.

Judgment reversed.

For Appellant—Melville B. Nimmer

For Respondent—Roger Arnebergh, City Attorney
Michael T. Sauer, Deputy City Attorney

—oOo—

In the corridor of the Courthouse, appellant wore a jacket upon which were inscribed the words "Fuck the Draft." Women and children were present in the corridor. Appellant neither engaged in, threatened, nor incited any acts of violence, nor were any other persons in the said corridor engaged in, threatening, or about to engage in acts of violence. Appellant at no time caused the emission of any loud or unusual noises. Someone other than appellant had placed the words "Fuck the Draft" on his jacket, but appellant was aware that such words were on the jacket at the time he wore it. He stated that by wearing the jacket as thus inscribed, the public was made aware of the depth of feeling against the draft

shared by himself and his friends, and that he had no wish to vex, annoy, or injure others.

Appellant was charged and convicted with disturbing the peace, in violation of Penal Code Section 415, and sentenced to thirty days in jail. He has appealed from the judgment of conviction.

It is apparent that appellant was arrested solely because of the words which were inscribed on the jacket. Appellant contends that Penal Code Section 415 as construed and applied by the trial court constituted an abridgment of appellant's constitutional right of free speech guaranteed by the First Amendment. Respondent, on the other hand, urges that the right of free speech is not absolute, but must be balanced against other public interests.

We find it unnecessary to decide the constitutional issue, since this case presents primarily a problem of statutory construction.

Appellant was charged and convicted under the portion of Penal Code Section 415 which prohibits disturbing the peace "by tumultuous *or* offensive conduct."

Respondent contends that since the statute is in the disjunctive, evidence sufficient to support a finding of either "tumultuous" conduct or "offensive" conduct will sustain a conviction. Respondent concedes that the conduct of the appellant was not "tumultuous" but urges that it was "offensive" and hence sufficient to uphold the conviction.

We agree that the appellant's conduct was "offensive", but not "tumultuous". We do not agree, however, that the problem of statutory construction can be solved by simply ascertaining whether the statute is in the disjunctive or in the conjunctive.

Although ordinarily the word "and" connotes conjunctive, and the word "or" connotes disjunctive or alternative, when necessary to harmonize the provisions of a statute or give effect to all its provisions, the word "or" may be read as "and" or conversely (*Bianco* vs. *Industrial Accident Commission* [1944] 24 Cal. 2d 584, 587; *People* vs. *Wright* [1955] 131 Cal. App. 2d Supp. 853, 862).

In order to ascertain the scope of the provision under which appellant was convicted, we will examine the scope of the common law crime known as "breach of the peace" or "disturbance of the peace" and the scope of the other provisions of Penal Code Section 415, the California "disturbance of the peace" statute.

Although there are no common law crimes in California, the common law may be a proper source of interpretation of a criminal statute to avoid fatal uncertainty or to assist in proper interpretation of a statute (1 Witkin, Cal. Crimes, p. 27).

It seems clear that not every misdemeanor is a breach of the peace, and that it is essential to show, as an element of the offense, a disturbance of public order and tranquillity by acts or conduct not merely amounting to unlawfulness, but tending also to create public tumult and to incite others to break the peace (12 Am. Jur. 2d 666).

A breach of peace is a public offense done by violence, or one causing or likely to cause an immediate disturbance of public order (Rest., Torts, Sec. 116).

The California Legislature in enacting Penal Code Section 415 specifically defined the acts which constitute disturbing the peace. In addition to "tumultuous or offensive conduct", the statute prohibits (1) loud or unusual noise; (2) threatening, traducing, quarreling, challenging to fight; (3) fighting; (4) horse racing on public streets; (5) firing of guns; (6) using any vulgar, profane, or indecent language within the presence of women and children, in a loud and boisterous manner.

It is to be noted that each of the prohibited acts contain elements of noise, disturbance, or conflict. This is consistent with the common law concept of "breach of the peace".

On the other hand, if we disregard the word "tumultuous" as the respondent suggests, then a person could be convicted of disturbing the peace whenever his conduct was "offensive" even in the absence of any tumult, noise, or conflict. Under such an interpretation, one could be convicted of disturbing the peace even though the "offensive" conduct was quiet and peaceful. Such an inter-

pretation is wholly inconsistent with the common law concept of disturbing the peace and wholly inconsistent with the other provisions of Penal Code Section 415.

Moreover, any suggestion that the Legislature intended to make all "offensive" conduct punishable as disturbing the peace would subject the statute to attack on the ground that it was vague and indefinite. It would be vague and indefinite because the statute would fail to indicate in what respect the conduct must be "offensive". For example, if one is engaged in such offensive conduct as picking his nose in public or failing to use the proper deodorant, could he be held guilty of disturbing the peace? These uncertainties could be avoided by limiting the "offensive" conduct to that which is also "tumultuous."

It is our opinion that the Legislature did not intend to punish as disturbing the peace "offensive" conduct that was quiet and peaceful, but only that which was "tumultuous". Accordingly, we hold that the prohibition against engaging in "tumultuous *or* offensive conduct" should be construed to read "tumultuous *and* offensive conduct".

In the present case, the appellant's conduct, while reprehensible, was quiet and peaceful. He neither engaged in, threatened, nor incited any acts of violence. Moreover, it is conceded by the prosecution that appellant's conduct was not "tumultuous". In the absence of conduct that was "tumultuous *and* offensive", the appellant was not guilty of disturbing the peace in violation of Section 415 of the Penal Code.

Deserving of additional comment is the provision of Section 415 expressly prohibiting "vulgar, profane, or indecent language." At common law, language itself, no matter how abusive and insulting, did not constitute a breach of peace. This rule is summarized in 11 Corpus Juris Secundum 819 as follows:

> "Unless so provided by statute, abusive and insulting language will not constitute a breach of the peace, where there is no threat of, or incitement to, immediate violence."

The California Legislature in 1877 amended Penal Code Section 415, to prohibit the use of "any vulgar, profane,

or indecent language within the presence or hearing of women or children, in a loud and boisterous manner" (Code Am. 1877-78, Chap. 299, p. 117). In so doing, the Legislature imposed two limitations upon prosecutions under the said provision: (1) that the offense must be committed within the presence or hearing of women and children, and (2) that it be in a loud and boisterous manner. Thus, it has been held that there may not be a conviction under this portion of 415 unless there is an allegation and proof that such language was used "in a loud and boisterous manner" and that this phrase was "a very necessary matter to complete the offense". *Ex parte Boynton* [1905] 1 Cal. App. 294. In the present case, there was neither such allegation nor proof.

The settled statement in this case disclosed that the trial court held that appellant could be convicted for violation of that portion of Section 415 prohibiting the use of "vulgar, profane, or indecent language within the presence of women and children, in a loud and boisterous manner", despite the fact that the complaint only charged the appellant with "engaging in tumultuous and offensive conduct." In so doing, the court erred. "Conviction upon a charge not made would be sheer denial of due process." (*De Jonge* vs. *Oregon* [1936] 299 U.S. 353, 362.)

The judgment is reversed.

Dated May 23, 1969.

We concur:

WONG
Judge

WHYTE
Presiding Judge

VASEY
Judge

MELVILLE B. NIMMER
715 Malcolm Avenue
Los Angeles, California
Telephone: 825-1485
Attorney for Defendant-Appellant

IN THE MUNICIPAL COURT OF THE
LOS ANGELES JUDICIAL DISTRICT
COUNTY OF LOS ANGELES
STATE OF CALIFORNIA

No. 310 996

PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF

—*vs*—

PAUL ROBERT COHEN, DEFENDANT

SETTLED STATEMENT ON APPEAL

Defendant-Appellant hereby submits this proposed settled statement on appeal.

I

STATEMENT OF ORAL PROCEEDINGS

The following is a condensed statement in narrative form of those portions of the oral proceedings material to the determination of the points on appeal.

There were a total of three witnesses testifying on behalf of the People. These were Police Sargeant Huston Splawn, Police Sergeant Katharine Scholler and Police Officer Alexander.

Sargeant Splawn testified as follows: On April 26, 1968, he observed the Defendant in the Court House corridor outside of Division 20. Defendant was wearing a jacket (later introduced in evidence as People's Exhibit No. 1) bearing the words "Fuck the Draft". There were women and children present in the said corridor. Defendant then entered the Courtroom of Division 20, where Defendant removed his jacket and held it folded over his arm. Sargeant Splawn sent a message to Judge Fainer of Division 20, requesting that Judge Fainer hold the Defendant in contempt of Court. Judge Fainer sent

a reply message to Sargeant Splawn, refusing to hold the Defendant in contempt. When the Defendant emerged from the Courtroom into the Court House corridor, Sargeant Splawn placed the Defendant under arrest, and advised him as to his constitutional rights upon arrest.

Sargeant Scholler and Officer Alexander corroborated Sargeant Splawn's testimony as to Defendant's presence in the said corridor, his wearing of the said jacket, his entering the said Courtroom, and as to the presence in the said corridor of women and children. No evidence was offered by the People indicating or tending to indicate that Defendant either engaged in or threatened any acts of violence, or was about to engage in any such acts, or that Defendant by his conduct incited any one else to any acts of violence, or that any persons observing Defendant engaged in or threatened, or were about to engage in acts of violence. No evidence was offered by the People indicating or tending to indicate that Defendant at any time caused the emission of any loud or unusual noises.

Defendant testified as follows: He is nineteen years old and employed by Ohrbach's Department Store. He admitted wearing the said jacket in the said corridor. He denied that he had placed the words "Fuck the Draft" on the said jacket, but admitted that he was aware that such words were on the jacket at the time he wore it. Defendant explained that on the night of April 25, 1968, he met with a group of friends and acquaintances and that some of those present suggested the need to inform the public of their opposition to the Vietnam War, and to the draft. Immediately following such discussion, someone whom the Defendant could not identify placed the words "Fuck the Draft" on Defendant's jacket. Someone other than Defendant also placed the words "Stop War" on the said jacket, as well as a "peace symbol" consisting of a circle with a verticle line running through the circle and two diagonal lines meeting the verticle line in the lower portion of the circle. Defendant himself also placed a second such "peace symbol" on the jacket. Defendant testified that he wore the said jacket the following day, April 26th, because it was a chilly day and this was his only jacket. He further stated that by wearing the said

jacket the public was made aware of the depth of feeling against the draft shared by himself and his friends. He stated that in wearing the jacket he had no wish to vex, annoy or injure others, nor did he wear the jacket for the purpose of injuring anyone else.

During the course of the trial the Court made the following rulings:

1. The Court held that "tumultuous or offensive conduct", within the meaning of Penal Code § 415, may consist of written words unaccompanied by any actual or threatened violence.

2. The Court held that that portion of Section 415 proscribing the use of "vulgar, profane, or indecent language within the presence of women and children, in a loud and boistrous manner" may apply to the use of such language in a written rather than oral form.

3. The Court held that Defendant may be convicted for violation of that portion of Section 415 proscribing the use of "vulgar, profane, or indecent language within the presence of women and children, in a loud and boistrous manner" despite the fact that the complaint only charges violation of another portion of Section 415, i.e. "engaging in tumultuous and offensive conduct."

4. The Court denied Defendant's motion to suppress evidence on constitutional grounds, holding that a conviction under Section 415 for the mere display of the words "Fuck the Draft" unconnected with any actual or threatened violence does not constitute a violation of Defendant's rights under the First and Fourteenth Amendments of the U.S. Constitution, or of Article I, § 9, of the California Constitution.

5. The Court held, as a matter of law, that the words "Fuck the Draft" are "obscene" within the constitutional meaning of that word.

6. The Court denied Defendant's motion for entry of judgment of acquittal under Penal Code § 1118.

7. The Court held that under the evidence Defendant may be convicted of violation of Section 415 without abridging his rights under the First and

Fourteenth Amendments of the U.S. Constitution, or of Article I, § 9, of the California Constitution.

8. The Court held that Section 415 as construed by the Court is not unconstitutionally vague.

9. The Court held that Section 415 as construed by the Court is not unconstitutionally overbroad.

The Court found the Defendant guilty as charged, and sentenced him to thirty days in jail.

II

GROUNDS FOR APPEAL

The grounds upon which Appellant intends to rely upon appeal are as follows:

A. The Court erred in holding that "tumultuous or offensive conduct" within the meaning of Penal Code § 415 may consist of written words unaccompanied by any actual or threatened violence.

B. The Court erred in holding that that portion of Penal Code § 415 proscribing the use of "vulgar, profane, or indecent language within the presence of women and children, in a loud and boistrous manner" may apply to the use of such language in written rather than oral form.

C. The Court erred in holding that Defendant may be convicted for violation of that portion of Penal Code § 415 proscribing the use of "vulgar, profane, or indecent language within the presence of women and children in a loud and boistrous manner" when the complaint only charges violation of another portion of Section 415, i.e. "engaging in tumultuous and offensive conduct."

D. The Court erred in that the evidence was insufficient to establish any actual or threatned violence by Defendant.

E. The Court erred in that the evidence was insufficient to establish that Defendant acted "willfully and maliciously."

F. The Court erred in denying Defendant's motion to suppress evidence on constitutional grounds, in that under the First and Fourteenth Amendments of the U.S. Constitution and Article I, § 9, of the Cali-

fornia Constitution the exhibition of written words may not be punished absent a showing that the words are either "obscene" or that their exhibition creates a clear and present danger of serious violence.

G. The Court erred in holding, as a matter of law, that the words "Fuck the Draft" are "obscene" within the constitutional meaning of that word.

H. The Court erred in applying Penal Code § 415 under the facts in evidence, in that Section 415 as thus applied is in violation of the First and Fourteenth Amendments of the U.S. Constitution and of Article I, § 9, of the California Constitution.

I. The Court erred in applying Penal Code § 415, since as construed by the Court, Section 415 is unconstitutionally vague in violation of the Fourteenth Amendment of the U.S. Constitution.

J. The Court erred in applying Section 415, since as construed by the Court, Section 415 is unconstitutionally overbroad in violation of the First and Fourteenth Amendments of the U.S. Constitution.

Dated: October 5, 1968.

MELVILLE B. NIMMER
Attorney for Defendant-Appellant

The foregoing Settled Statement on Appeal consisting of 5 pages is now settled, allowed, certified and signed as the Statement on appeal herein.

DATED: Oct. 30, 1968

/s/ James Harvey Brown
Judge of the Municipal Court of
Los Angeles Judicial District

APPELLATE DEPARTMENT
OF THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Superior Court No. CR. A. 8258
Trial Court No. 310996

PEOPLE OF THE STATE OF CALIFORNIA,
PLAINTIFF AND RESPONDENT

vs.

PAUL ROBERT COHEN, DEFENDANT AND APPELLANT

ORDER CERTIFYING CAUSE TO COURT OF APPEAL—
June 5, 1969

Pursuant to Rule 63(a) and (c), California Rules of Court, and upon timely application by the respondent, we certify that transfer of the above-entitled cause to the Court of Appeal appears necessary to settle an important question of law.

The question so presented is:

> Does conduct which may be "offensive" but lacks any aspect of being "tumultuous" violate Penal Code Section 415 covering disturbances of the peace?

By our opinion, a copy of which is attached hereto, we concluded that the Legislature did not intend to punish as disturbing the peace, "offensive" conduct that was quiet and peaceful, but only that which was "tumultuous." Accordingly, we determined as a matter of statutory construction that said Penal Code section applies only to conduct which has some element of tumult actual or threatened and that the section should be construed as if it read:

> "Every person who maliciously and wilfully disturbs the peace or quiet of any neighborhood or per-

son by loud or unusual noise, or by tumultuous [and] offensive conduct," etc.

Dated Jun. 5, 1969

BY THE COURT

WHYTE
Presiding Judge

VASEY
Judge

WONG
Judge

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

2d Crim. No. 16702
Superior Court No. CR A 8258
Trial Court No. 310996

PEOPLE OF THE STATE OF CALIFORNIA,
PLAINTIFF AND RESPONDENT

vs.

PAUL ROBERT COHEN, DEFENDANT AND APPELLANT

THE COURT:

The appellate department of the Superior Court of Los Angeles County having certified that a transfer of the appeal in the above entitled action to the Court of Appeal appears necessary to settle important questions of law, and good cause appearing therefor, the appeal from the Municipal Court, Los Angeles Judicial District, County of Los Angeles, State of California, now pending in the appellate department of the Superior Court of the County of Los Angeles and numbered CR A 8258 therein, is hereby transferred to the Court of Appeal, Second Appellate District, Division Two. The appeal is calendared for oral argument before this court on July 15, 1969, at 9:30 a.m.

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

2d Crim. No. 16702

PEOPLE OF THE STATE OF CALIFORNIA,
PLAINTIFF AND RESPONDENT

vs.

PAUL ROBERT COHEN, DEFENDANT AND APPELLANT

OPINION OF THE COURT OF APPEAL—
Filed October 22, 1969

Certification from the Appellate Department of the Superior Court of Los Angeles County pursuant to Rule 63(a) and (c). Affirmed.

Melville B. Nimmer for Defendant and Appellant.

Roger Arnebergh, City Attorney, Michael T. Sauer, Deputy City Attorney for Plaintiff and Respondent.

Paul Robert Cohen was charged in a complaint filed in the Municipal Court with a violation of section 415 of the Penal Code. The complaint alleges that the defendant "did wilfully and unlawfully and maliciously disturb the peace and quiet of the neighborhood of 110 North Grand and the peace and quiet of this complainant and other persons then and there being present, by then and there engaging in tumultuous and offensive conduct." Trial by jury was waived. The defendant was found guilty, probation was denied and he was sentenced to 30 days in the county jail.

FACTS

On April 26, 1968 the defendant was observed in the Los Angeles County Courthouse in the corridor outside of Division 20 of the Municipal Court wearing a jacket bearing the words "Fuck the Draft" which were plainly visible. There were women and children present in the corridor. The defendant was arrested. The defendant

testified that he wore the jacket knowing that the words were on the jacket as a means of informing the public of the depth of his feelings against the Vietnam War and the draft.

The defendant did not engage in, nor threaten to engage in, nor did anyone as the result of his conduct in fact commit or threaten to commit any act of violence. The defendant did not make any loud or unusual noise, nor was there any evidence that he uttered any sound prior to his arrest.

QUESTION PRESENTED

Is offensive conduct which is not also tumultuous punishable under Penal Code section 415?[1]

Penal Code section 415 makes punishable a disturbance of the peace or quiet of a neighborhood by tumultuous *or* offensive conduct. If this statute is interpreted literally, any conduct which is tumultuous but not "offensive" is a crime and any conduct which is offensive but not "tumultuous" is a crime.

The appellant argues that he cannot be guilty of the crime of breach of the peace since his conduct consisted of the use of words unaccompanied by violence or the threat of violence.

It is the appellant's contention that the offense of disturbance of the peace does not exist without actual or

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[1] Penal Code section 415 provides as follows: "Every person who maliciously and willfully disturbs the peace or quiet of any neighborhood or person, by loud or unusual noise, or by tumultuous or offensive conduct, or threatening, traducing, quarreling, challenging to fight, or fighting, or who, on the public streets of any unincorporated town, or upon the public highways in such unincorporated town, run any horse-race, either for a wager or for amusement, or fire any gun or pistol in such unincorporated town, or use any vulgar, profane, or indecent language within the presence or hearing of women or children, in a loud and boisterous manner, is guilty of a misdemeanor, and upon conviction by any court of competent jurisdiction shall be punished by fine not exceeding two hundred dollars, or by imprisonment in the county jail for not more than ninety days, or by both fine and imprisonment, or either, at the discretion of the court."

threatened violence or behavior which is *likely* to create a disturbance. We agree with this statement of the law. However, we reach a different conclusion in applying the law to the facts.

Breach of the peace and disturbing the peace are synonymous terms. Section 415 when enacted in 1872 was a codification of the existing common law crime of breach of the peace. Therefore, in resolving the novel question presented us we can look to the common law to assist us in assaying the legislative intent behind the use of the words "offensive conduct".

In *Cantwell* v. *Connecticut*, 310 U.S. 296 at page 308 the United States Supreme Court stated the common law succinctly "The offense known as breach of the peace embraces a great variety of conduct destroying or *menacing* public order and tranquility. It includes not only violent acts but acts and words *likely* to produce violence in others." (Emphasis added.)

The Restatement, Second, Torts, section 116 contains this definition of the crime of breach of the peace: "A breach of the peace is a public offense done by violence, or likely to cause an immediate disturbance of public order."

In California our appellate courts have evolved the same definition for the crime of disturbing the peace.

Any act or conduct which disturbs the peace and quiet by inciting violence or which tends to provoke others to break the peace constitutes disturbance of the peace (*People* v. *Anderson*, 17 Cal.App. Supp. 763, 767; 9 Cal. Jur.2d §§ 17-18). "It is not necessary that any act have in itself any element of violence in order to constitute a breach of the peace." (*People* v. *Green*, 234 Cal. App. 2d Supp. 871, 873.)

We conclude from the foregoing authorities that if it can be reasonably anticipated that certain conduct will cause others to disturb the peace, wilfully and maliciously engaging in such behavior constitutes a disturbance of the peace.

Thus, under section 415 a person who engages in offensive behavior which has a tendency to provoke *others* to acts of violence or to in turn disturb the peace and

quiet is guilty of disturbing the peace although his own conduct, while offensive, was not in itself violent.

In the matter before us the defendant deliberately wore a jacket emblazoned with language which is clearly offensive and below the "minimum standard of propriety and the accepted norm of public behavior" (*Goldberg* v. *The Regents of the University of California*, 248 Cal. App.2d 867, 880) at least when paraded through a courthouse corridor containing women and children. The defendant's conduct consisted of more than a quiet and peaceful assertion of his convictions about the draft. He carefully chose the forum for his views where his conduct would have an effective shock impact. The defendant's stated purpose was to force a confrontation with others as to his opinion of the draft. The expression he chose to display on his jacket is one which is not used publicly to espouse a philosophy or a personal conviction. He was intent upon attracting the attention of others to his views by the sheer vulgarity of his expression. He must have been aware that his behavior would vex and annoy a substantial portion of his unwilling "audience". His conduct was, therefore, malicious under Penal Code section 7.[2]

It was certainly reasonably foreseeable that such conduct might cause others to rise up to commit a violent act against the person of the defendant or attempt to forceably remove his jacket. The fact that the police intervened and that the defendant was arrested before violence occurred does not make his conduct any the less provocative. We think it also a reasonable inference from the time and place of defendant's act that he intended to provoke disorder.

It is our conclusion that the defendant's acts constituted the type of offensive conduct prohibited by section 415 in that it had a tendency to incite others to violent behavior or to disturb the peace.

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[2] Penal Code section 7 provides in part as follows: ". . . The words 'malice' and 'maliciously' import a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law; . . ."

It is also our view that it is not a valid defense to a charge of disturbing the peace that the defendant's conduct was not violent or tumultuous if it was foreseeable that his acts would tend to cause others to commit violent acts or disturb the peace.

The court's minutes reflect that the defendant was found guilty as charged. The complaint charged him with engaging in tumultuous *and* offensive conduct. There was no evidence that the defendant engaged in "tumultuous" conduct. Penal Code section 415 sets forth a series of acts in the disjunctive. When an accusatory pleading sets forth more than one act prohibited by section 415 in the conjunctive, evidence which is sufficient to support a finding of guilt of any one of the acts denounced by the statute is sufficient for a conviction although the evidence does not support a conviction for each of the acts set out in the complaint (*People* v. *McClennegen*, 195 Cal. 445, 452).

The appellant also contends that the term "offensive" is unconstitutionally vague and overbroad." We disagree. In *People* v. *Green*, 234 Cal.App.2d Supp. 871, 875 cert. denied, 382 U.S. 993, Penal Code section 415 was held to be "not unconstitutionally vague or indefinite." We feel the language relied upon by the California Supreme Court in [a] *People* v. *Daniels, et al.* (October 2, 1969) —— Cal.2d ——, —— is particularly applicable as a standard in construing the constitutional scope of the term "offensive" as used in section 415. "In reaching this conclusion we invoked the settled rule of statutory interpretation that " 'All laws should receive a sensible construction. General terms should be so limited in their application as to not lead to injustice, oppression, or an absurd consequence. *It will always, therefore, be presumed that the Legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over the letter.*' " (*United States* v. *Kirby* [1868] 74 U.S. [7 Wall] 482, 486-487 accord; *People* v. *Oliver* [1961] 55 Cal.2d 761, 767, and cases cited.) (Emphasis added.)

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[a] Advance Report Citation: ..... A.C. .....

The words "offensive conduct" have stood the test of time and have a commonly accepted meaning. The term "offensive" has a well established meaning when used in connection with words which can cause a breach of the peace. In *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571-572, the United States Supreme Court quoted with approval the following language from the opinion of the Supreme Court of New Hampshire in *State* v. *Chaplinsky*, 91 N. H. 310, 18 A. 2d 754: "The word 'offensive' is not to be defined in terms of what a particular addressee thinks. . . . The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. . . . The English language has a number of words and expressions which by general consent are 'fighting words' when said without a disarming smile. . . . Such words, as ordinary men know, are likely to cause a fight. So are threatening, profane or obscene revilings. Derisive and annoying words can be taken as coming within the purview of the statute as heretofore interpreted only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace. . . . The statute, as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitute a breach of the peace by the speaker—including 'classical fighting words,' words in current use less 'classical' but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats."

As modified by case law the only "offensive" conduct prohibited by section 415 is that which incites violence or has a tendency to incite others to violence or a breach of the peace. (Cf. *People* v. *Davis*, 68 Cal.2d 481, 486-487.) This standard makes clear for triers of fact the nature of the forbidden conduct, and eliminates prosecutions or convictions for conduct which is merely offensive.

The appellant argues that Penal Code section 415 if interpreted to prohibit the behavior which led to his arrest and conviction violates his right to freedom of speech as guaranteed by the First Amendment.

In analyzing this constitutional attack we can look to the guidelines set forth in opinions of the United States Supreme Court involving the conflict created by the coexistence of the right of freedom of speech and the crime of disturbance of the peace where the alleged disturbance involves the use of language.

Freedom of speech is not absolute. It must be balanced against other public interests (*American Communications Assn.* v. *Douds*, 339 U.S. 382, 399; *Bread* v. *Alexandria*, 341 U.S. 622, 642). ". . . when 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms." (*United States* v. *O'Brien*, 391 U.S. 367, 376; 20 L.Ed.2d 672, 680.)

The First Amendment does not afford any protection to one who uses language which tends to incite violence or a disturbance of the peace by others. "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite to an immediate breach of the peace. It has been well observed that such utterances are no essential part of any such exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. 'Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.' *Cantwell* v. *Connecticut*, 310 U.S. 296, 309-310." (*Beauharnais* v. *Illinois*, 343 U.S. 250, 255; *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571-572.)

The right to freedom of speech does not protect illegal conduct merely because it is in part initiated, evidenced, or carried out by means of language either spoken, written, or printed. (*Giboney* v. *Empire Storage and Ice Co.*,

336 U.S. 490, 502; 93 L.Ed. 834, 843; *Cox* v. *Louisiana*, 379 U.S. 559, 563; 13 L.Ed.2d 487, 492-493; *People* v. *Davis*, 68 Cal.2d 481, 486.)

"When protest takes the form of mass demonstration, parades; or picketing on public streets and sidewalks . . . the free passage of traffic and *the prevention of public disorder and violence* become important objects of legitimate state concern. As the court stated in *Cox* v. *Louisiana*, 'We emphatically reject the notion . . . that the First and Fourteenth Amendments afford the same freedom to those who would communicate ideas by conduct such as patroling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech, 379 U.S. 535, 555; 13 L.Ed.2d 471, 484; 85 S.Ct. 453.'" (Emphasis added.) (*Walker* v. *Birmingham*, 388 U.S. 307, 316.)

"One may . . . be guilty of the offense [of breach of the peace] if he commits acts or makes statements likely to provoke violence or disturbance of good order, even though no such eventuality be intended." (*Cantwell* v. *Connecticut*, 310 U.S. 296, 396; 84 L.Ed. 1213, 1221.)

In the case before us, the defendant's conduct consisted of "speech" and "non-speech" elements. Here the non-speech element of defendant's conduct consisted of marching through a public building with the premeditated intent of attracting the attention of others to the message on his jacket.

The gravaman of the defendant's offense was his selection of the public corridors of the county courthouse as the place to parade before women and children who were involuntarily subjected to unprintable language. The expression used by the defendant to propagate his views is one of the most notorious four-letter words in the English language. Despite its ancient origins, it has yet to gain sufficient acceptance to appear in any standard dictionary (cf. Webster's Third New International Dictionary; The Oxford Dictionary of American English; The Oxford English Dictionary). In the work "A Dictionary of Slang and Unconventional English" by Eric Partridge, the word is defined; however, the second letter has been replaced with an asterisk.

The defendant has not been subjected to prosecution for expressing his political views. His right to speak out against the draft and war is protected by the First Amendment. However, no one has the right to express his views by means of printing lewd and vulgar language which is likely to cause others to breach the peace to protect women and children from such exposure.

It is our view, based on our interpretation of the decisions of the United States Supreme Court that the defendant's conduct in this case went beyond the permissive ambit of the First Amendment's protection as circumscribed in the *Cantwell, supra, Chaplinsky, supra,* and *Beauharnais, supra,* cases.

The trial judge ruled that although the complaint charged the defendant with disturbing the peace by means of tumultuous and offensive conduct, the defendant could be found guilty of the use of "vulgar, profane, or indecent language within the presence of or hearing of women or children in a loud boisterous manner" conduct also prohibited by section 415 of the Penal Code. This ruling was incorrect. Proof that the language was uttered in a "loud and boisterous" manner is "a very necessary matter to complete the offense" of disturbing the peace by the use of vulgar, profane and indecent language in the presence or hearing of women and children (*Ex parte Bognton,* 1 Cal. App. 294). In the present case there was no proof that the defendant engaged in any loud or boisterous conduct. Furthermore, a person cannot be found guilty of a crime of which he was not charged. "Conviction upon a charge not made would be sheer denial of due process." (*DeJorge* v. *Oregon,* 299 U.S. 353, 362.)

We have found that the evidence was sufficient to support a conviction for disturbing the peace by means of offensive conduct as prohibited by section 415 of the Penal Code. A decision which is right in result will not be reversed on appeal although the reason stated is wrong. (*People* v. *Evans,* 249 Cal.App.2d 254, 257; *People* v. *Selz,* 138 Cal.App.2d 205, 210.)

In a court trial, the trial judge's erroneous opinion on the law is not grounds for a reversal. (*People* v.

Wolfe, 257 Cal.App.2d 420, 426.) We have examined each of the points raised by the defendant without finding reversible error. The judgment is affirmed.

Alarcon, *J. pro tem.**

We concur:

Roth, *P. J.*
Fleming, *J.*

* Assigned by Chairman of the Judicial Council.

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

Crim. No. 16702

PEOPLE

v.

COHEN

MINUTES OF NOVEMBER 13, 1969

The Court: Petition for rehearing denied.

Order Due December 19, 1969

ORDER DENYING HEARING AFTER JUDGMENT
BY THE COURT OF APPEAL

2nd District, Division 2, Crim. No. 16702

ALARCON, J. P. T.
R & F

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
IN BANK

[Filed Dec. 17, 1969, William I. Sullivan, Clerk.]

PEOPLE

v.

COHEN

Appellant's petition for hearing DENIED.
Traynor, C.J., Peters, J., and Tobriner, J., are of the opinion that the petition should be granted.

TRAYNOR
Chief Justice

SUPREME COURT OF THE UNITED STATES

No. 1809 Misc., October Term, 1969

PAUL ROBERT COHEN, APPELLANT

v.

CALIFORNIA

ON CONSIDERATION of the motion for leave to proceed in forma pauperis herein,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

June 22, 1970

SUPREME COURT OF THE UNITED STATES

No. 1809 Misc., October Term, 1969

PAUL ROBERT COHEN, APPELLANT

v.

CALIFORNIA

APPEAL from the Court of Appeal of the State of California, Second Appellate District.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case of the merits. The case is transferred to the appellate docket as No. 1731 and placed on the summary calendar.

June 22, 1970

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